United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1152

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1152

IN THE MATTER OF THE
PETITION FOR ARBITRATION

Between

FAIR WIND MARITIME CORPORATION
as Owner of the S.S. *Isabena*,

Petitioner-Appellee,

and

TRANSWORLD MARITIME CORPORATION,

Respondent-Appellant.

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

Reply to the Statement of the Case

Although it is unusual to reply to a "Statement of the Case", a careful reading of Fair Wind's "Statement of the Case" demonstrates the fallacy of its attempt to arbitrate an obviously "frivolous and baseless claim". Although four pages are devoted to its "Statement of the Case", Fair Wind has omitted any statement of facts.

The petition to arbitrate, filed on June 19, 1973 (1a), for which no proof of service is contained in the record, states in paragraph 5 that "disputes arose between Peti-

tioner and Respondent under the said charter and *thereafter* Petitioner on June 7, 1972 made written demand upon Respondent for arbitration naming as an arbitrator Mr. Lloyd C. Nelson" (4a) (Emphasis supplied). The letter of June 7, 1972, referred to in the petition, reads as follows (19a):

"June 7, 1973

"Transworld Maritime Corporation
c/o Admiralty Agencies Ltd.
17 Battery Place
New York, New York 10004

"Re: 'Isabena'
C/P dated June 14, 1972

"Dear Sirs:

"We represent the Owners of the Isabena in connection with their claims arising out of the captioned Charter Party. Owners' claims are for the loss of the Vessel and various expenses and liabilities which may be incurred as a consequence of the Vessel capsizing at the port of Karachi.

"On behalf of Owners we demand arbitration and appoint as an arbitrator Mr. Lloyd C. Nelson of Global Chartering and Brokerage Co., Inc., 29 Broadway, New York, New York 10006. Please promptly appoint your arbitrator, failing which we shall be obliged to petition the court to appoint one on your behalf.

"Very truly yours,

Healy & Baillie

By: Nicholas J. Healy, Jr.

NJHjr:jp

Certified Mail—

Return Receipt Requested"

Transworld Maritime Corporation repeats and reiterates that the petition to compel arbitration misstated that "disputes arose . . . and *thereafter* petitioner . . . made written demand . . . for abitration . . . ." (Emphasis supplied). This is demonstrated by the letter annexed to Fair Wind's brief and with which recently retained counsel of appellant, Transworld, was unfamiliar. Transworld's letter states:

"ADMIRALTY AGENCIES LTD.
17 Battery Place, Suite 1918
New York, N. Y. 10004

Telephone: (212) 344-0060
Cables: Flagship NewYork
TWX: 710-581-5760

Telex: 422376 (ITT)
223367 (RCA)
620220 (WUI)

June 13, 1973

"Healy & Baillie
29 Broadway
New York, New York 10006

"Attention: Mr. N. J. Healy, Jr.

"Gentlemen:

"Re: S/S 'Isabena'
C/P of 6/14/72

"We acknowledge receipt of your letter of June 7, 1973 in connection with the above captioned vessel.

"In the nearly one year since the vessel sank, we were not previously aware of any claim between our principals and Owners, concerning the loss of the

'Isabena' nor can we conceive of any liability which may attach to a Time Charterer in this matter.

"Very truly yours,

ADMIRALTY AGENCIES LTD.,
As Agents.

A Marangos for
Captain G. J. Ross

GJR/am"

From the foregoing correspondence, it is therefore clear that, prior to June 7, 1973, Fair Wind made no contact with Transworld Maritime, and, having made no claim, no dispute could have arisen. Therefore, the fifth paragraph of Fair Wind's Petition to Compel Arbitration is patently a misstatement of fact, and the correct statement of fact clearly raises the issue as to whether Transworld Maritime has refused to comply with the arbitration provision.[1]

Certainly no dispute can arise unless a claim is made against Transworld Maritime, and if the first notice of any claim was the June 7 demand for arbitration, the statement that "*thereafter* petitioner . . . made written demand . . . "

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[1] The action of Fair Wind in this case is in contrast to the actions of a plaintiff (represented by the attorneys who represent Fair Wind in this case) in another case in which plaintiff therein communicated with defendant from December 23, 1970 until May 26, 1971, before instructing its counsel to file a petition to arbitrate. *Premier SS Corp.* vs. *Embassy of Algeria*, 336 F.Supp. 507 (SDNY —1971). The trial judge in that action was quite concerned that he could not comply with the Statute and hold a hearing to determine if the respondent, who had not appeared, disputed the allegations of petitioner. Judge Palmieri did hold a hearing in the nature of an *ex parte* hearing and granted the petition to arbitrate on October 20, 1971. Had Fair Wind acted in a similar manner in this case, there would never have been any necessity for Fair Wind's petition to compel arbitration and no necessity for this appeal.

(Emphasis supplied) is also patently a misstatement, and raises the same issue as to whether Transworld Maritime has failed to comply with the arbitration provision of the charter party.

The response to Fair Wind's letter of June 7, 1972, set forth on page 3 *supra,* is not a refusal to arbitrate but merely acknowledges receipt of Fair Wind's demand, and expresses its astonishment that it had not been contacted during the one year period that had elapsed since the sinking of the *Isabena,* and also expressed Transworld's lack of knowledge of any liability that could exist under the charter party. This is, therefore, not a refusal to comply with the arbitration provision in the charter party, because it is obvious from Fair Wind's letter and Transworld's reply that Transworld Maritime Corporation has never been told the substance of Fair Wind's claim, has never had an opportunity to investigate the alleged complaint, settle or dispute it, and thus bring it to an arbitrable stage.

Fair Wind's brief reviews matters in the District Court, and complains of the tactics used there. The simple answer is contained in the opinion of the Honorable Lawrence W. Pierce, in which he denied Fair Wind's application for attorney's fees and, while expressing no opinion on the merits of the controversy, says "but in denying petitioner's application for attorney's fees, the court notes that the motion of respondent, while not sustained, raises issues which are not deemed frivolous". (37a) Fair Wind has elected not to appeal from the decision of the court below, and should not now be allowed to raise any issue as to the correctness of the finding by the District Court.

Finally, in its "Statement of the Case", Fair Wind complains of attempts to stay the order of the District Court and that Transworld's notice of appeal and brief were not filed until the last day allowed in each case. Fair Wind and its counsel are well aware that appellate counsel for Transworld Maritime was not retained until Judge Pierce's memorandum was filed, and that counsel was then in Europe and did not return until just before Christmas, and thereafter proceeded in this case as rapidly as his other commitments would allow. To use the time allowed by the Rules of Court is not delay. Appellant asked for no extension of time in which to designate or file the appendix, nor to file its brief.

The issue and the argument advanced herein by Transworld has never been resolved against a litigant raising a similar issue as to whether there was a dispute, and, therefore, to assert its legal rights in a case in which the inequitable conduct of Fair Wind has placed Transworld in a position of arbitrating a "frivolous and patently baseless claim" does not support Fair Wind's statement that there were "obvious delays and . . . spurious bases [for] charterer's motion and appeal".

No penalties should be awarded and, on the contrary, it is urged that Fair Wind's persistent attempt to bring to arbitration a "frivolous and patently baseless claim" has exposed it, in an appropriate forum, to a claim for malicious prosecution and/or abuse of process.

ARGUMENT

I.

Charterer has not waived the defense of insufficiency of service of process.

The Federal Arbitration Act, 9 U.S. Code 4, provides in regard to the petition to compel arbitration that "service [of the petition] shall be made in the manner provided for by the Federal Rules of Civil Procedure." The Federal Rules of Civil Procedure, Rule 81(a)(3), provides "in proceeding under Title 9 U.S. Code relating to arbitration . . . these rules apply only to the extent that matters of procedure are not provided for in those statutes".

The Statute does not set forth any time limit or a method for filing an answer to the petition. Therefore, obviously, Federal Rules 7 through 10 apply to this proceeding and certainly Transworld Maritime has a right to respond to a petition and should not be compelled to accept facts asserted by Fair Wind. The equity of this procedure is apparent in this case, for the statement "disputes arose . . . and thereafter a written demand for arbitration was made" in paragraph five of the petition is, on the face of the appendix (19a) and Fair Wind's brief (p. 13), obviously erroneous, and an answer to the petition, if it had been allowed, could have raised this issue.

Fair Wind, the shipowner interests, intimates that the method for service of the petition "as required by the Federal Rules of Civil Procedure" does not refer to the "Federal Rules concerning [service of] summons and complaint in ordinary actions." But, every case cited in any

brief always refers to provisions of Rule 4 of the Federal Rules of Civil Procedure which concerns service of summons and complaint.

As the Federal Rules of Civil Procedure clearly provide (and it is not otherwise provided by Statute), insufficiency of service of process is not waived, except under the conditions described in Rule 12, and as there has been neither a motion nor an answer filed, insufficiency of service of process has not been waived.

It is not a question of jurisdiction that Transworld Maritime raises in its argument concerning lack of proof in the record of service of the petition, but it is inequity of filing a petition and not allowing Transworld Maritime to answer it, and raise the issue for the trial judge to resolve.

By a denial of paragraphs 5 and 6 of the shipowner's petition to arbitrate, it always would have been clear that Transworld has consistently asserted (1) that no disputes have arisen between Fair Wind and Transworld, and (2) that Transworld has never failed and refused to appoint an arbitrator. Unless there is a dispute, the Arbitration Statute does not apply, and having given Transworld no opportunity to consider its alleged claim, Fair Wind seeks to obtain arbitration *ex parte,* ignoring Transworld Maritime until it made its demand to arbitrate an unknown claim.

Fair Wind cannot unilaterally fashion a dispute; and, therefore, the issue to be presented was never clearly before the trial judge because Fair Wind made erroneous statements in its petition and has never allowed Transworld Maritime to answer and controvert them.

II.

There is a real and viable issue as to whether Transworld Maritime has refused to comply with the arbitration agreement.

Fair Wind states on page 6 of its brief that "charterer raised no issue of fact concerning the making of the agreement", and that statement is quite correct. It then goes on to say "there could be no issue as to the refusal to comply therewith." As with other of its unilateral assertions, this completely ignores the facts.

Fair Wind should not be allowed to pass this issue by casually saying "there could be no issue as to the refusal to comply with the arbitration provision". Although in the court below Fair Wind seemed to make a claim based on the loading, stowing and trimming provisions of the charter party, apparently Transworld's brief concerning its liability thereunder has caused Fair Wind to abandon that contention by dismissing it as the employment of a "novel method of legal reasoning".

As late as 1969, Judge Smith of this Court stated "although a frivolous or patently baseless claim should not be ordered to arbitration, a court's function in an action to compel arbitration is limited to ascertaining whether a party seeking arbitration is making a claim which, on its face, is governed by the contract." *Hamilton Life Insurance Co. of N.Y.* vs. *Republic National Life Insurance Co.*, 408 F2d 608, 609 (CA2—1969).

To determine whether a claim is "frivolous or patently baseless" is not an attempt to argue the merits of the case. If the argument of Fair Wind is taken to its logical con-

clusion, then it has the right merely to assert, in the manner it did in the instant case, that Fair Wind believes that Newton's First Law of Motion is incorrect and that Transworld disputes this contention and, therefore, demands arbitration and the appointment of an arbitrator. Even Fair Wind should agree that such a claim is "frivolous and patently baseless".

To argue there is no dispute, or even the possibility of one, is not an argument of the case on the merits, and this court is the proper forum to decide this matter if there is a dispute.

In regard to the identical provisions of the New York Arbitration Statute and the Federal Arbitration Statute, Transworld Maritime did not point out in detail in its initial brief that subsequent to the cases cited on page 11 of its initial brief that the New York Statute was amended, and under this provision, the court "may not consider whether the claim with respect to which arbitration is sought is tenable or otherwise pass upon the merits of the dispute". *Matter of Wilaka Construction Co.,* 17 N.Y.2d 195, 204; 269 N.Y.Supp. 2d 697, 703 (N.Y.—1966).

This amendment clearly took the question of "*bona fide* or frivolous dispute" out of the hands of the court, but this change was accomplished by means of a statutory enactment, and the Federal Arbitration Statute has not been similarly amended. As an analogy to the Federal Arbitration Act, and the statements of Judge Smith in *Hamilton Life* vs. *Republic National Life, supra,* the cases cited on page 11 of Transworld's initial brief are applicable, and it is still the law under the Federal Arbitration Act,

that frivolous and patently baseless claims should not be ordered to arbitration.

The reference to *United Steelworkers* vs. *American Mfg. Co.*, 363 U.S. 564 (1960) is inapposite for that concerned 29 U.S. Code 173(d) and not 9 U.S. Code 4. The statutes are substantially different.

III.

Transworld's appeal is not frivolous and Fair Wind is not entitled to damages and double costs but has, in fact, exposed itself to a claim for malicious prosecution and abuse of process.

In every case cited by Fair Wind on pages 8 through 12 of its brief, matters had taken a normal course, i.e. the parties had raised their contentions and disputes had arisen. None of the cases permitted a party unilaterally to assert a dispute existed, and then resist any attempt to raise the issue as to existence of a dispute and whether a party had refused to comply with arbitration demands, except by running the risk of having its defense entitled frivolous, and thus exposing itself to penalties and costs.

To use the same assertion as that of Fair Wind on page 7 of its brief, it need hardly be said that the charterer considers its opposition to the petition for arbitration to be meritorious. It is also the only time that it can raise this issue, for should a frivolous or patently baseless claim go to arbitration, the attack on any award is extremely narrow.

As stated earlier in this brief, appellate counsel for Transworld was retained only after Judge Pierce entered his memorandum opinion, and is only familiar with those matters that are contained in the record and printed in the appendix.

No issue has been made either in the court below or in this court for the purposes of delay, and in the words of this court "the issues raised here have never been resolved adversely to charterers" and, therefore, it has a right to raise this issue and have it decided by the court without its claim being considered frivolous.

On the contrary, Fair Wind having pursued an attempt to arbitrate without probable cause, without informing Transworld of its claim (i.e. with malice), and this having interfered with plaintiff's property by resort to an order compelling arbitration, may in the future be subjected to a valid claim of malicious prosecution.[2]

Similarly having sought to compel Transworld to arbitrate an unknown claim, which is so baseless that Fair Wind dare not describe it, and having rushed to compel arbitration without allowing time for Transworld to raise a dispute, Fair Wind may also have subjected itself to a claim for abuse of process, as it is using an otherwise legitimate means to attempt to force Transworld to settle a baseless claim.[3]

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[2] See: *Bercy Industries Inc.* vs. *Mechanical Mirror Works, Inc.*, 279 F.Supp. 428, 429 (SDNY—1968) for a discussion of the elements of a claim for malicious prosecution.

[3] For a discussion of abuse of process, See: *Weiss* vs. *Hunna*, 312 F2d 711, 717 (CA2—1963).

CONCLUSION

Transworld Maritime Corporation submits that the issue raised below and decided adversely to it and the issue argued here is whether Transworld has refused to comply with the arbitration provision of the charter party. A decision on this matter is reserved to the court, and the shipowner, Fair Wind, cannot unilaterally raise a dispute and, without allowing Transworld Maritime to reply, properly obtain an order to send its unilaterally asserted issue to arbitration. Any competent arbitrator would find that certain principles—for example, Newton's First Law of Motion—are simply not subject to dispute. Fair Wind's claim is no more disputable, and Transworld submits that the court will perceive this and not compel a charterer to arbitrate such an issue.

The decision and order from which this appeal is taken should be reversed, and the petition dismissed, or in the alternative, the case should be remanded to the District Court and the shipowner, Fair Wind, should be required to set forth its claim and allow Transworld Maritime Corporation sufficient time to investigate and consider it, and then determine if there is a dispute, and in the interim, the order appointing an arbitrator on behalf of Transworld Maritime should be vacated, and Transworld Mari-

time allowed to appoint its own arbitrator if there are ever disputes to be arbitrated.

April 22, 1974
New York, New York

Respectfully submitted,

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Service of three (3) copies of the within Reply Brief is hereby admitted this 24th day of April 1974

Attorney for
Healy & Sullivan